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No. 85-549

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioner,*
VS.
GERALD NEIL CALLAHAN,
*Respondent.*

## BRIEF IN RESPONSE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# TOPICAL INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| STATEMENT OF FACTS | 5 |
| REASONS FOR DENYING THE WRIT | 10 |
| ARGUMENT | 12 |
| I THE CALIFORNIA COURT OF APPEAL CORRECTLY HELD THAT THE EPITHET SPOKEN TO THE POLICE OFFICER CONDUCTING A CRIME SCENE INVESTIGATION WAS NOT, IN THE CONTEXT OF THE FACTS OF THIS CASE, INHERENTLY LIKELY TO PROVOKE AN IMMEDIATE VIOLENT RESPONSE | 12 |
| II RESPONDENT HAS NOT CONTENDED, NOR DID THE CALIFORNIA COURT OF APPEAL HOLD, THAT A CONVICTION OF CALIFORNIA PENAL CODE SECTION 415(3) REQUIRES PROOF THAT THE ADDRESSEE WAS ACTUALLY PROVOKED TO VIOLENCE | 22 |
| CONCLUSION | 25 |

# TABLE OF AUTHORITIES

Page

## CASES

Chaplinsky v. New Hampshire
(1942) 315 U.S. 568 . . . . . passim

Cohen v. California
(1971) 403 U.S. 15 . . . . . passim

## STATUTES

California Penal Code
Section 148 . . . . . 8, 17
Section 415(3) . . . . . 13, 22

California Vehicle Code
Section 23152(a) . . . . . 9

## RULES OF COURT

Rules of the Supreme Court
Rule 34.2 . . . . . 2

California Rules of Court
Rule 127 . . . . . 4, 5

## CONSTITUTION

United States Constitution
First Amendment . . . . . 11, 12, 22
Fourteenth Amendment . . . . . 11, 12

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# BRIEF IN RESPONSE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Gerald Neil Callahan, respectfully prays that this Honorable Court exercise its discretion to deny petitioner's request for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate

District, entered on May 22, 1985, and modified on June 3, 1985, which reversed the judgment of the trial court.

## OPINIONS BELOW

Respondent is not dissatisfied with the presentation of the opinions and judgments delivered in the courts below set forth in the appendices to the petition for writ of certiorari, and respondent therefore, pursuant to Rule 34.2, does not include the opinions below in this brief.

## JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is not dissatisfied with the presentation of the jurisdictional grounds and the constitutional and statutory provisions involved which are set forth in the petition for writ of certiorari.

## STATEMENT OF THE CASE

Respondent is not aware of any inaccuracy in the Statement of the Case set forth in the petition for writ of certiorari.

Respondent submits, however, that this Court should be aware of additional matter regarding the adoption of the settled statement of facts on appeal which is not included in the Statement of the Case submitted by petitioner.

Subsequent to the filing of respondent's notice of appeal on June 25, 1984, the respondent prepared and filed his proposed settled statement on appeal, which was filed with the trial court on July 10, 1984. Petitioner did not file any proposed amendments to respondent's proposed settled statement, and instead, on August 9, 1984, filed its own proposed settled statement of facts on appeal.

On August 21, 1984, the trial court

certified petitioner's proposed statement as the settled statement of facts on appeal, completely disregarding the proposed statement submitted by respondent, and, respondent respectfully submits, contrary to the provisions of Rule 127 of the California Rules of Court.

The proposed settled statement which was submitted by respondent and disregarded by the trial court included a more detailed statement of the facts which, as suggested by the California Court of Appeal in its opinion below, would have provided a reviewing court a more complete picture of the facts and evidence.

## STATEMENT OF FACTS[1]

At 12:19 a.m. on August 27, 1983, early Saturday morning, California Highway Patrol Officer C.F. George was dispatched to 607 South Cedros, Solana Beach, to investigate a traffic collision. He arrived at 12:31 a.m. He initially determined that a truck had struck two parked cars. Witnesses directed him to the driver of the truck, who was seated on a lawn chair, being attended to by several persons, including the respondent's wife.

Office George saw that the driver

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[1]The facts are taken from the settled statement of facts on appeal engrossed and certified by the trial court pursuant to Rule 127, California Rules of Court. A copy of the settled statement appears as Appendix D to the petition for writ of certiorari. As noted by the California Court of Appeal in its opinion below, the settled statement left "much to be desired" and was incomplete. The Court of Appeals concluded, however, that even on the basis of the accepted statement of facts, limited though it may have been, the facts did not, as a matter of law, support the conviction.

had sustained a superficial scratch on his forehead and asked if he wanted to go to a hospital. The driver adamantly stated he did not.

Officer George returned to the scene of the collision to begin his investigation. He was anxious to clear the area inasmuch as the vehicles involved were in the street and would present a traffic hazard to persons who would soon begin leaving bars in the area.

When Officer George returned to the driver of the truck to take his statement, the respondent announced that he was a doctor, had examined the driver and felt he required medical attention. The respondent appeared to be intoxicated.

Officer George advised the respondent that the driver had declined medical attention. The respondent began

arguing with the officer. Officer George turned to the driver and asked again if he desired medical attention. The respondent's wife and another person replied, "Yes!" and the driver subsequently agreed. Officer George then radioed for an ambulance and returned to the collision scene.

While Officer George gathered witness statements, the respondent interrupted and asked about the ambulance. Officer George told him that one was on the way. The respondent responded, "Oh bull-shit! Don't give me that fucking shit." Officer George warned the respondent not to interfere and turned away to complete his investigation.

The respondent continued to follow the officer around yelling and using profanities. He interrupted the officer several times as he spoke to witnesses.

He stepped in front of Officer George several times yelling for the ambulance as the officer attempted to move away from him. On at least two occasions he was so close to Officer George that he spat in his face as he arqued for medical attention.[2]

Officer George warned the respondent three times to stop interfering or he would be arrested for delaying a police office in violation of Penal Code section 148. After the third warning, the respondent called the officer a "fucking asshole" and was arrested.

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[2]As noted by the California Court of Appeal in its opinion below, the parties to this appeal have not contended that respondent spat in the face of Officer George. The meaning of the perhaps misleading choice of words in the settled statement of facts on appeal is that spittle from respondent hit the officer in the face as respondent argued with him for medical attention and not as any deliberate show of contempt for the officer.

The driver of the truck, treated and released at the scene by paramedics, was also arrested for violation of Vehicle Code section 23152(a), driving under the influence of alcohol.

On the way to the detention facility, the respondent apologized to the officer and admitted he had been wrong about the need for medical attention.

The confrontation between respondent and Officer George lasted between 10 and 20 minutes. There was no direct physical contact between the two during the exchange. Officer George testified the language used by the respondent did not provoke a violent reaction.

It should be noted that nothing in the settled statement of facts declares that respondent is other than a medical doctor, and further, nothing in the

settled statement of facts declares that Officer George was offended by respondent's remarks, or that he arrested respondent because he was offended or provoked or likely to be provoked to violence. In fact, the record would appear to be clear that the arrest of respondent was for interfering with Officer George in the performance of his duties, not for the use, per se, of offensive language or "fighting words." Finally, there is nothing in the record on which petitioner's assertion that other witnesses overheard the offending language can be based.

## REASONS FOR DENYING THE WRIT

Contrary to the petitioner's oft stated assertion that the California Court of Appeal failed to consider the context in which the offending words were spoken, respondent respectfully submits

that the Court of Appeal carefully considered the context in which "the Callahan epithet"[3] was spoken. Although the California Court of Appeals cited in support of its decision the opinion in Cohen v. California (1971) 403 U.S. 15, its decision is not in conflict as petitioner asserts. Further, in the context in which the Callahan epithet was addressed to Officer George, its terms were not "fighting words" which were inherently likely to provoke an immediate violate response on the part of Officer George, or anyone else for that matter, nor were they beyond the protection of the First and Fourteenth Amendments. Chaplinsky v. New Hampshire (1942) 315

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[3] The California Court of Appeal, in its opinion below, preferred to refer to the words at issue as "the Callahan epithet," "[t]o avoid continuing repetition of the phrase which arguably would assist its passage into parlor parlance . . ." The offending words used were "fucking asshole."

U.S. 568.

Respondent would also submit to this Honorable Court that there exists no special or important reason to grant the extraordinary relief prayed for.

## ARGUMENT

### I

### THE CALIFORNIA COURT OF APPEAL CORRECTLY HELD THAT THE EPITHET SPOKEN TO THE POLICE OFFICER CONDUCTING A CRIME SCENE INVESTIGATION WAS NOT, IN THE CONTEXT OF THE FACTS OF THIS CASE, INHERENTLY LIKELY TO PROVOKE AN IMMEDIATE VIOLENT RESPONSE

Petitioner voices a lofty concern for the cherished freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution. In the same breath, however, petitioner would have this Court impose an inflexible limitation on the words which a citizen may use in addressing a police officer, and elevate police officers to a class to be

protected from the commonplace street vernacular of the English language.

Petitioner further asserts that resolving the question of limits with respect to the right to freely criticize police officers will "preserve with clarity our right to free debate and exchange of ideas on the one hand, and our hope for an orderly society reasonably protected by peace officers on the other hand."

The "clarity" which petitioner invites, however, would result in a permanent restriction on the use of certain words of expression and would require this Honorable Court to abandon the reasoned opinion of Mr. Justice Harlan in Cohen v. California.

Cohen v. California (1971) 403 U.S. 15, addressed a predecessor to the present California Penal Code section 415, which prohibited "maliciously and

willfully disturb[ing] the peace or quiet of any neighborhood or person ... by ... offensive conduct." The appellant had worn a jacket with the words "Fuck the Draft" on it in a corridor of the Los Angeles Courthouse. Like the facts of this case, the appellant "did not engage in, nor threaten to engage in, nor did anyone as a result of his conduct in fact commit or threaten to commit any act of violence." 403 U.S. at pp. 16-17.

In Chaplinsky v. New Hampshire (1942) 315 U.S. 568, this Court held that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction. 403 U.S. at p. 20.

Petitioner asserts that the state court is in error in this case since the Callahan epithet was apparently addressed to an individual (Officer George), while in Cohen the offending words were not directed to any one individual. However, the issue presented is not properly subject to such simplistic analysis.

The issue remains, as in Cohen, whether this court should excise, as "'offensive conduct,' one particular scurrilous epithet from the public discourse, ... upon the theory ... that its use is inherently likely to cause violent reaction." 403 U.S. at p. 22. The petitioner's rationale, like that of the California Court in Cohen, is untenable, "reflecting as it does an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." 403 U.S. at p. 23.

There is no evidence in the record that a substantial number of citizens "are standing ready to strike out physically at whoever may assault their sensibilities" upon hearing the Callahan epithet.

Nor is there evidence in the record from which it may be assumed that Officer George was offended to the degree that it was inherently likely that he would be provoked to react violently. In fact, Officer George continued to behave in a professional manner without regard to the continued barrage from the respondent. He warned respondent that he would arrest him if he continued to engage in conduct which Officer George deemed to be interference, and, true to his word, when appellant then hurled the final expression, Officer George placed respondent under arrest for interfering with a police officer. Respondent was

acquitted of this charge.[4]

Of singular importance to resolution of this matter is not so much what the settled statement of facts includes, but what it does not include. An analysis of the facts of this case cannot support a conviction which is not in conflict with the Chaplinsky and Cohen cases.

In Chaplinsky v. New Hampshire, supra, this Court cited with approval the language of the highest court of New Hampshire:

> . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are `fighting words'

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[4]The California Court of Appeal, in its opinion below, indicated that if appellant were appealing a conviction of interfering with a police officer (California Penal Code section 148), it would have affirmed.

> when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker -- including `classical fighting words', words in current use less `classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."
> Chaplinsky v. New Hampshire, 315 U.S. at p. 573, citing State v. Brown, 68 N.H. 200, 38 A. 731.

In the cause before this Court, no such situation exists. While it cannot be argued that respondent's epithet was "said with a disarming smile," neither may it be said that respondent's words were anything more than an annoyance to

Officer George. Respondent's conduct, including his unfortunate choice of words used to express his frustration with what he deemed to be the officer's inattention, was viewed by its addressee only as interference, not as a threat to the peace.

The State presumes that the words used by the respondent were fighting words -- those inherently likely to provoke a violent response. As in Cohen, the State's rationale is untenable, reflecting an "undifferentiated fear or apprehension of disturbance." 403 U.S. at p. 23. The record is devoid of any evidence that "substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities" by the utterance of the Callahan epithet. And while it may be true that "[t]here may be some persons about with such lawless and violent

proclivities," that is an insufficient basis for permitting, "consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." 403 U.S. at p. 23.

Respondent was trying to get Officer George's attention. He succeeded in doing so. It took a number of profanities but eventually Officer George thought respondent was interfering with his responsibilities and accordingly arrested him for interfering. There is no evidence in the record that the particular terms used by respondent contributed to the arrest. As the California Court of Appeal indicated, anything respondent said at that time would have led to his arrest.

The appellant's argument really seeks to punish the respondent for

interference, which the jury determined was not proved. Appellant argues, without factual support in the record, that since the words were spoken to provoke a reaction and were hostile, "[t]he reaction was likely to be hostile -- a 'fighting' reaction." All words are spoken to provoke a reaction, but it is impossible to conclude that respondent sought to obtain a hostile reaction on the basis of the record in this case. Respondent was seeking medical attention which he perceived, perhaps incorrectly, the officer had failed to request.

Appellant's argument is pure sophistry. That the court below failed to consider the context in which the words were spoken is simply without merit. A reinstatement of the conviction as prayed by appellant would serve only to excise the words "fucking asshole" from permissible discourse and run "a

substantial risk of suppressing ideas in the process." Cohen v. California, supra, 403 U.S. at p. 26.

II

RESPONDENT HAS NOT CONTENDED, NOR DID THE CALIFORNIA COURT OF APPEAL HOLD, THAT A CONVICTION OF CALIFORNIA PENAL CODE SECTION 415(3) REQUIRES PROOF THAT THE ADDRESSEE WAS ACTUALLY PROVOKE TO VIOLENCE

Appellant next contends that this Court should grant its petition to resolve the issue whether the "fighting words" exception to the First Amendment's free speech guarantee requires proof that the addressee was actually provoked to violence. Appellant has seized on language of the California Court of Appeal in its opinion below that Officer George was "neither offended by Callahan's foul language nor provoked to react violently."

Respondent has never contended, and the California Court of Appeal did not

hold, that proof that Officer George was actually provoked to violence was necessary to support a conviction under the disturbing the peace statute. This is simply not an issue that requires clarification or resolution. All that the California Court of Appeal was correctly pointing out was that there was no showing that anyone who heard the epithet directed to Officer George, including Officer George, was in fact violently aroused or that respondent intended such a result. Cohen v. California, supra, 403 U.S. at p. 20.

Appellant asserts that Officer George was in fact offended. There is nothing in the record to indicate that he was offended, and the court below in fact acknowledged that the record reflected that he was not offended.

However, even if Officer George was offended by the language utilized by

respondent, such is an insufficient reason to punish the respondent for his choice of expression to vent his frustration with the officer's conduct.

Finally, appellant addresses the issue of whether police officer's are to be held to a "higher threshold of 'offensiveness'." Again, respondent has not contended and the California Court of Appeal did not state, that citizens are free to hurl "fighting words" at peace officers because their training and experience somehow inures them to abusive language. That issue was not before the court below.

The issue was whether the words used by respondent were inherently likely, in the context in which spoken, to provoke a violent response. Once it is resolved that they were not, then the issue of whether peace officers are to be held to a higher standard is not

necessary of resolution.

It is respectfully suggested that if this Court is to address such an issue, it should be on the basis of a factual record where the issue was clearly discussed and analyzed by the courts below.

## CONCLUSION

It appears that appellant really seeks to reverse the respondent's acquittal by a jury for interfering with a peace officer, and complains of the trial court's instruction regarding disturbing the peace. This complaint should not be elevated to an issue of constitutional proportions requiring this Court to address issues of free speech on the basis of the present record, particularly since the rationale of the California Court of Appeal is in full accord with the decisions of this Court.

For the reasons discussed above, respondent respectfully requests that the petition for writ of certiorari be denied.

DATED: December 20, 1985

Respectfully submitted,

By: _____
JAMES M. GATTEY

By: _____
STEPHEN W. PARRISH

Attorneys for Respondent